

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

RALPH E. PRICE, on behalf of himself and
all others similarly situated,

Plaintiffs,

v.

Civil Action No. 2:10-cv-216

ROBERT M. GATES, Secretary of Defense
in his individual and official capacities, the UNITED STATES
DEPARTMENT OF DEFENSE, and the UNITED
STATES OF AMERICA,

Defendants.

DEFENDANTS' JOINT REPLY MEMORANDUM
IN SUPPORT OF THEIR MOTION TO DISMISS
FIRST AMENDED CLASS ACTION COMPLAINT

By his memorandum opposing defendant's Motion to Dismiss, plaintiff Ralph E. Price attempts to circumvent the sovereign immunity of the United States by relying on the Little Tucker Act (28 U.S.C. § 1346) and the Administrative Procedures Act ("APA") (5 U.S.C. 701, *et seq.*). Neither statute, however, applies in plaintiff's instant action to permit the claims plaintiff seeks to assert. Rather than repeat their arguments in this Reply, defendants offer this additional rebuttal argument.

A. Contrary to Plaintiff's Contention, the Little Tucker Act Does Not Create Any Substantive Right Enforceable Against the United States for Money Damages.

Plaintiff attempts to circumvent the requirement that a money mandating statute is a necessary predicate to seeking a claim for money damages against the United States by arguing

that plaintiff is merely seeking money “improperly ‘retained’” by defendants. Memorandum in opposition, p. 9). Were plaintiff’s semantical exercise accepted, then for all intents and purposes the Little Tucker Act’s waiver of sovereign immunity would always create a substantive right of action against the United States, since a claim for money owed could always be characterized as one for money “improperly retained.” Of course, that is not the law, and plaintiff is required to base his claim on a money mandating statute. *Tristan v. United States*, 424 U.S. 392, 398 (1974).

Moreover, plaintiff’s characterization of the bonus which he claims he is owed as “part of a pay system” and “not a discretionary bonus” (Memorandum in Opposition, p. 9) is another semantical exercise which purports to deprive words of their plain meaning, not to mention the meaning provided to them by federal regulation, wherein a bonus is defined as: “an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay.” 5 C.F.R. §9901.304 (Jan 1, 2006). By definition, then, plaintiff is incorrect in his characterization of his claim for money owed, and must point to a money mandating statute that would require payment in this case. This he has failed to do.

B. The APA Does Not Support Plaintiff’s Claim.

In their memorandum supporting their motion to dismiss, defendants explained why the Mandamus Act, Declaratory Judgment Act, and Back Pay Act failed to provide a basis for plaintiff’s claim here. In response, plaintiff seeks establish his claim under the Administrative Procedures Act, 5 U.S.C. § 701, *et seq.* Memorandum in Opposition, pp. 11-15. The fundamental flaw in plaintiff’s contention, however, is that his complaint fails assert a cause of action that contests a final Agency decision as arbitrary and capricious under the APA. 5 U.S.C. § 706.

In the first instance, as plaintiff correctly notes, section 701(a)(1) of the APA specifically excludes judicial review of agency action where “agency action is committed to agency discretion by law.” As articulated by defendants in Section IV.A.2. of their Memorandum, incentive award statutes such as that at issue here, are entirely discretionary. Hence, plaintiff is not entitled to pursue relief under the APA for his failure to receive a bonus.

Second, it is well-established that the APA’s waiver of sovereign immunity does not apply to suits for money damages. *See, e.g., Ross v. United States*, 460 F.Supp.2d 139, 149 (D.C.D.C. 2006); *Buiaz v. United States*, 471 F.Supp.2d 129, 138 (D.C.D.C. 2007). At bottom, plaintiff seeks, on behalf of himself and “tens of thousands of DoD civilian employees” money damages for bonuses he claims were wrongfully withheld. Memorandum in Opposition, p. 2. The APA will not waive the United States’ sovereign immunity for such a claim.

Third, to the extent the agency action plaintiff challenges is the implementation of federal regulations and DoD instructions requiring employees to be in NSPS-covered positions on the effective date of the performance payout (the first pay period after January 1) in order to receive a bonus, plaintiff has failed to plead an APA action under 5 U.S.C. §§ 702 and 706. As discussed in Section II of defendant’s Memorandum, two sets of rules were used to implement the NSPS rating system. Inasmuch as the second set of rules, found at 5 C.F.R. §9901.304, superceded the first set of rules, any challenge to the first set of rules, and by extension, agency action taken pursuant to them, is moot. Moreover, district court review under the APA is limited to the record of the administrative proceedings. *See, e.g., NVE, Inc. v. Dep’t of Health and Human Services*, 436 F.3d 182 (3rd Cir. 2006). Nowhere in plaintiff’s complaint does he contest how the agency developed the rules about which he complains, or articulate how the rules are arbitrary or

capricious. In fact, other than a scant reference to the APA in paragraph 14 of the complaint,¹ plaintiff does not articulate a cause of action under the APA, or even make reference to it, at all. As a result, plaintiff has failed to state a claim under the APA.

Plaintiff has failed to assert a proper cause of action against defendants under any of the bases articulated in the complaint. Plaintiff's claim for his bonus is nothing but a claim for money damages unavailable under the APA. Logically, the government can only act through its agencies. If jurisdiction could attach merely by reliance on a claim of "agency action" under the APA, then the government has permanently waived sovereign immunity for all of its actions.

Clearly this is not the case. Plaintiff's complaint should be dismissed.

NEIL H. MACBRIDE
UNITED STATES ATTORNEY

By: /s/
Lawrence R. Leonard
Managing Assistant United States Attorney
Virginia State Bar No. 37995
Attorney for Defendants
United States Attorney's Office
101 West Main Street, Suite 8000
Telephone - 757 - 441 - 6331
Facsimile - 757 - 441 - 6689
E-Mail - lawrence.leonard@usdoj.gov

OF COUNSEL:
JOHN D. NOEL
Senior Trial Attorney
Navy Litigation Office

¹ While the caption to Count I provides "Declaratory Relief/Review Pursuant to Administrative Procedures Act", nothing in Count I articulates a claim as to how DoD's final agency action in passing relevant federal regulations and DoD instructions concerning eligibility to receive performance payout bonuses is arbitrary and capricious.

CERTIFICATE OF SERVICE

I hereby certify that, on the 27th day of July 2010, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of electronic filing (NEF) to the following filing user:

Lisa A. Bertini
Bertini, O'Donnell & Hammer, P.C.
999 Waterside Drive, Ste. 1010
Norfolk, VA 23510
lbertini@bohlaw.net

/s/

Lawrence R. Leonard
Managing Assistant United States Attorney
Virginia State Bar No. 37995
Attorney for Defendant
United States Attorney's Office
101 West Main Street, Suite 8000
Norfolk, VA 23510
757- 441-6331 Office
757-441-6689 Fax
lawrence.leonard@usdoj.gov